No. 82-977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,

Appellants,

v.

LEON W. KNIGHT, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Minnesota

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BRIEF FOR THE APPELLEES

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QUESTION PRESENTED

Is Minnesota's Public Employment Labor Relations Act unconstitutional because it grants Appellant Minnesota Community College Faculty Association a monopolistic privilege to "meet and confer" with Appellant Minnesota State Board for Community Colleges, on the basis of the former's status as exclusive representative for Appellees in the State's community colleges, even though: (i) this Court held exclusive representation itself unconstitutional in *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), and *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1936), and has never overruled or limited those decisions; and (ii) this Court has repeatedly invalidated legislative schemes designed to deny citizens equality of legal opportunity to participate in the political process?

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BRIEF FOR THE APPELLEES

Appellees Leon W. Knight, *et alia,* hereby submit their brief on the merits, urging affirmance of the District Court's decision in No. 82-977.

STATEMENT OF THE FACTS

Knight and other faculty-members in the Minnesota community colleges sued to challenge the constitutionality of public-sector collective bargaining through exclusive representation under Minnesota's

Public Employment Labor Relations Act (PELRA).[1] After the Court of Appeals for the Eighth Circuit ruled that Knight raised substantial constitutional questions,[2] the parties entered into extensive stipulations of fact, and presented evidence in hearings on two issues relevant to this appeal: (i) whether the "meet-and-negotiate" provisions of PELRA[3] delegate governmental sovereignty to Appellant Minnesota Community College Faculty Association (MCCFA), and thereby abridge popular sovereignty for its benefit; and (ii) whether the "meet-and-confer" provisions of the act[4] discriminatorily deny academic freedom to Knight and other non-members of MCCFA by precluding them from conferring with their employer, Appellant Minnesota State Board for Community Colleges (Board), on matters of public concern relating to the performance of their duties as instructors.

At trial, Appellants conceded that PELRA requires the Board to negotiate and confer with MCCFA, a private organization, over college policies; that MCCFA is the only organization that can enforce this requirement; that through these imposed negotiations and conferences MCCFA attempts as much as possible to influence college policies; and that MCCFA considers itself and the Board "equal part-

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[1] Minn. Stat. §§ 179.61 *et seq.*

[2] Knight v. Alsop, 535 F.2d 466 (8th Cir. 1976).

[3] Minn. Stat. §§ 179.63, subds. 16, 18; 179.65, subd. 4; 179.66, subds. 1-2, 7; 179.68, subds. 2(5), 3(3); 179.70; 179.74; 179.741, subd. 1(10).

[4] Minn. Stat. §§ 179.63, subd. 15; 179.65, subds. 1, 3; 179.66, subds. 3, 7.

ners in [the] process [of setting terms and conditions of employment]".[5] The parties then developed the significance of these facts through expert testimony.

I. The parties' expert witnesses testified without contradiction that collective bargaining and exclusive representation under Minnesota's Public Employment Labor Relations Act are equivalent to the systems of collective bargaining and exclusive representation involved in the statutes this Court struck down in *Schechter* and *Carter*.

The expert witnesses in labor and industrial relations (Professor Milton Derber, for the Board) and in political economy (Professor Melvyn Krauss and Dr. Philip Bradley, for Knight and the other faculty-members) all agreed that collective bargaining and exclusive representation under PELRA are evolutionally derivative of, functionally equivalent to, and structurally identical with the systems extant under the National Industrial Recovery Act (NIRA) and the Bituminous Coal Conservation Act (BCCA),[6] which this Court held unconstitutional in *A.L.A. Schechter Poultry Corp.* v. *United States*[7] and *Carter* v. *Carter Coal Co.*[8]

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[5] Defendant State Officials' Stipulations, Set I, Nos. 16-20; Transcript of Hearings Before Special Master Leonard K. Lindquist (T.) at 218-19, 466-71, 473-78, 774-78, 5338-46, 5381-82. *See* Plaintiffs' Revised Stipulations Nos. 1667-72; T. at 2140, 2579-85.

[6] Respectively, Act of 16 June 1933, ch. 90, 48 Stat. 195, *and* Act of 30 August 1935, ch. 824, 49 Stat. 991.

[7] 295 U.S. 495 (1935).

[8] 298 U.S. 238 (1936).

Professor Derber testified that the concepts of collective bargaining and exclusive representation under PELRA trace historically to, and are evolutionary developments of, those concepts as first embodied in NIRA and BCCA. Specifically, after explaining that NIRA "was the basis for * * * the arrangements that were developed under" BCCA, he testified as follows:

> Q. * * * [I]n your studies and research in this area have you found any legislation subsequent to [BCCA] and [NIRA] * * * which embodied * * * these same principles * * * that the [Supreme] Court dealt with in the Schechter and Carter cases? Were there any other laws after that that were of the same nature?
>
> A. * * * [O]n the labor side * * * all of these ideas were embodied in subsequent legislation. * * * [A]s far as [NIRA] section 7(a) [which provided for exclusive representation] was concerned, this * * * has been incorporated in all of these public-sector laws [such as PELRA] * * *.
>
> Q. Was there any significant difference between Section 7 of the NIRA and subsequent legislation dealing with labor relations * * * in your opinion?
>
> A. Not basically.

Then, asked whether "the function of collective bargaining that's going on in PELRA is essentially the * * * same functional operation as was going on in" NIRA and BCCA, Derber answered: "they were both designed to provide a framework in which collective bargaining could take place". On these points, Dr. Bradley concurred completely.[9]

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[9] T. at 5199, 5177, 5181-82, 5195-99, 5291; 5630-31.

Professor Krauss equated NIRA, BCCA, and PELRA as three statutory systems that conform analytically to the "corporative-state" (or "corporate-state") model of political economy, the key structural element in each being exclusive representation. In the private sector, Krauss testified, corporative-state arrangements "entai[l] the collectivization of employees * * * [and] employers by exclusive representation, * * * negotiations * * * [and] agreement between these groups as to the proper values of the key economic variables such as wages, and then submission of this agreement to government to approve or disapprove". In the public sector, such arrangements involve "the collectivization of employees by exclusive representation and the negotiation and agreement to ke[y] economic variables between the collectivized employees' group and the government". But, in both sectors, the same principles of political-economic analysis apply. In all of these judgments, Dr. Bradley concurred without reservation.[10]

In the public sector, Krauss explained, corporative-state institutions operate through compulsory collective bargaining between government as the employer and private groups of "collectivized employees". Through collective bargaining, "the government is * * * coerced to deal with these private groups". In this bargaining-structure, exclusive representation is "an essential,

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[10] *Id.* at 1342 (BCCA structurally equivalent to PELRA), 1352-53 (BCCA structurally equivalent to NIRA), 1353-54 (NIRA structurally equivalent to PELRA), 1341-42 (BCCA fits corporative-state model), 1353 (NIRA fits corporative-state model), 1324-28 (PELRA fits corporative-state model), 1343, 1401-02, 1311-12, 1285; 5616-28, 5633. *See id.* at 5231-33 (testimony of Professor Derber, defining basic corporative-state institutions).

critical element"—"the indispensable mechanism by which employees are collectivized". Noting that "[t]he representative is the sole spokesman for all members of the collectivized group, regardless of whether those members share the policies of the spokesman or do not", Krauss defined the purpose of exclusive representation as being

> to impose conformity of opinion among the members of the collectivized group with respect to the economic variables with which the group is concerned * * * [in order] to create a monopoly of political influence. This monopoly of political influence for exclusive representatives is the essence of the corporate state. * * * To have monopoly of political influence you need unanimity of action. To have unanimity of action you need conformity of opinion. To have conformity of opinion you need exclusive representation.

Specifically under PELRA, Krauss found corporative-state analysis applicable because: (i) MCCFA is a private organization, not a governmental agency; (ii) MCCFA represents all community-college faculty, whether or not they are its members; and (iii) MCCFA engages in compulsory collective bargaining with the Board pursuant to the statute's "meet-and-negotiate" and "meet-and-confer" provisions.[11]

This expert testimony establishes as a matter of political-economic fact that PELRA's exclusive-representation provisions fall squarely within the ambit of *Schechter* and *Carter*.

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[11] *Id.* at 1339-40, 1350-51, 1493-94, 1313, 1305, 1308, 1318-19, 1404, 1406, 1306-08, 1325-33, 1453-54, 1489-92, 1494.

II. The parties' expert witnesses testified without contradiction that collective bargaining and exclusive representation under Minnesota's Public Employment Labor Relations Act undermine governmental and popular sovereignty.

The expert witnesses in labor and industrial relations (Professor Milton Derber, for the Board), political economy (Dr. Philip Bradley, for Knight and the other faculty-members), political science (Professor Gordon Tullock, for Knight), and political theory (Professor Sylvester Petro, for Knight), all agreed regarding the effects of PELRA on representative government. Professor Derber testified: (i) that compulsory public-sector collective bargaining provides private organizations of public employees with a special procedure for controlling or influencing public-policy decisionmaking in addition to those employees' participation in the normal political process of elections and lobbying; (ii) that this special procedure is not available to other interest-groups concerned with the particular public policies at issue; and (iii) that therefore collective bargaining affords public employees more opportunity to influence the determination of these policies than other citizens have. In this context, Derber described PELRA's requirement that the Board "meet and negotiate" and "meet and confer" with MCCFA over college policies as "a sharing of responsibility for [that] particular function". By authorizing collective bargaining, he explained, "[t]he legislature is in effect saying that in the management of our governmental system in this state and these agencies it is appropriate for [MCCFA] to have a certain [share] in the decision-making". Derber linked this sharing of authority with an historic reformula-

tion of the doctrine of sovereignty: "[T]here was an increasing conviction that the idea of absolute sovereignty * * * was no longer an acceptable idea, namely, that * * * State Legislator[s] did have the right and the power to delegate various of these responsibilities or to share them * * * with private groups".[12]

Dr. Bradley agreed that public-sector collective bargaining transfers some amount of authority from popularly elected or regularly appointed officials to private groups acting as exclusive representatives:

> What happens under PELRA * * * is that there is a very substantial shift in the locus of decision making from individuals * * * and public authorities * * * to private [collectivities]. Actually, under those circumstances you cannot have collective bargaining of the kind that you have in the private sector. The reason * * * is that the [collectivities] that are created, these organizational groups now exert a tremendous power, or possess a tremendous power to make decisions.

Bradley then expanded on a major difficulty in the shifting of decision-making power under compulsory public-sector collective bargaining:

> A. * * * [T]he difficulty * * * is, where do you cut this off? Once you get producer groups deciding how the public revenues are to be allocated, how do you cut it off? Where can you say "This is the final step in shifting the focus of decision making?" * * * I can readily imagine many other groups [besides public employees] that have a legitimate interest in the making of decisions of this kind.

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[12] *Id.* at 5254, 5256, 5265, 5243, 5242, 5167.

Q. As an economist you can see no particular rational criterion for determining which groups should or should not participate?

A. No, I see absolutely no rational basis for that, and frankly, the whole system, once you start on it becomes pretty much an organizational disaster and a decision-making disaster.[13]

Professor Tullock explained that statutes giving particular private interest-groups a means to exert disproportionate influence on the government through special schemes of representation or lobbying are inconsistent with the normal pattern of representative government in this country (popular sovereignty).[14]

And Professor Petro testified that:

> [w]ith respect to governmental sovereignty, compulsory public sector collective bargaining is an absolute contradiction in which * * * governmental sovereignty * * * cannot continue to exist. There is no way in which governmental sovereignty can survive the existence of an absolute duty to bargain with an agency to which the employees of the government owe allegiance.
>
> * * * *
>
> [C]ompulsory public sector bargaining guarantees a state of affairs that's incompatible with governmental and popular sovereignty mainly because it tends to divert * * * the loyalty of public employees away from the government and the public to the [exclusive] representative which these laws have taught them to believe is mainly the agency that's going to represent their interests.[15]

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[13] *Id.* at 5650, 5651-52.

[14] *Id.* at 3708-10.

[15] *Id.* at 1743-44, 1758.

This expert testimony establishes as a matter of political-economic fact that PELRA's compulsory collective-bargaining provisions fall squarely within the ambit of numerous decisions of this Court applying the fundamental constitutional principle of political equality.[16]

The District Court acknowledged all this testimony and Knight's contention that, "because MCCFA is a private organization, it holds an impermissible power under PELRA to make 'economic laws' and its function constitutes an impermissible delegation of state sovereignty". But it held that: (1) "Minnesota has not impermissibly delegated its sovereign power", because "[n]egotiated agreements with state employees and even arbitration awards must be 'submitted to the legislature to be accepted or rejected' "; (2) "the legislature's retained authority" is sufficient, because "[t]he continuing vitality of *Schechter* and *Carter* * * * is doubtful at best"; (3) this Court's decision in *Abood* v. *Detroit Board of Education*[17] "squarely upholds the

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[16] City of Phoenix v. Kolodziejski, 399 U.S. 204, 208-10 (1970); Evans v. Cornman, 398 U.S. 419, 422-26 (1970); Cipriano v. City of Houma, 395 U.S. 701, 704-06 (1969); Kramer v. Union Free School Dist., 395 U.S. 621, 630-33 (1969); Kirkpatrick v. Priesler, 394 U.S. 526, 533 (1969); Williams v. Rhodes, 393 U.S. 23, 31-32 (1968); Harper v. Board of Elections, 383 U.S. 663, 666 (1966); Carrington v. Rash, 380 U.S. 89, 93-94 (1965); Davis v. Mann, 377 U.S. 678, 691-92 (1964); Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 736-37, 738 & n.31 (1964); Gray v. Saunders, 372 U.S. 368, 379-80 (1963).

For an analytical overview of these decisions, *see* E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (1980), at 50-59.

[17] 431 U.S. 209 (1977).

constitutionality of exclusive representation bargaining in the public sector"; and (4) MCCFA's ability to exercise extraordinary political influence under PELRA has "no constitutional significance". Relying on these rulings, the District Court declared that, with regard to exclusive representation, "PELRA as applied to the community colleges is * * * valid in all respects".[18]

The District Court then acknowledged that PELRA's meet-and-confer" process also functions "only through the exclusive representative". But it distinguished "meet and confer" from "meet and negotiate" on various grounds, ultimately holding that "the rationale which * * * supports [collective bargaining] generally does not justify the MCCFA's sole authority to select meet and confer representatives in the community colleges", and declaring that monopolistic "authority" unconstitutional "in the context of higher education".[19]

Knight appealed in No. 82-901 from the District Court's decision on "meet and negotiate"; and MCCFA and the Board separately appealed in Nos. 82-977 and 82-898 from that Court's decision on "meet and confer". This Court summarily affirmed the District Court's ruling on "meet and negotiate"—improvidently, as Knight demonstrates hereinafter. And it agreed to hear the appeals on "meet and confer". Responding to MCCFA's appeal in No. 82-977, Knight argues herein that PELRA's "meet-and-confer" system is unconstitutional because it extends a monopo-

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[18] Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges, *in* No. 82-898, at A-9 to A-13, A-14 n.8; A-31.

[19] *Id.* at A-17 to A-31.

listic privilege to MCCFA based solely upon MCCFA's statutory status as exclusive representative in the community colleges, a status that not only lacks rational, articulated support in any decision of this Court, but also flies in the face of this Court's decisions in *Schechter* and *Carter,* and in numerous cases applying the fundamental constitutional principle of political equality. Responding in a separate brief to the Board's appeal in No. 82-898, Knight will contend that the District Court's invalidation of the "meet-and-confer" provisions was correct regardless of the constitutionality *vel non* of the "meet-and-negotiate" scheme.

SUMMARY OF THE ARGUMENT

In *Schechter* and *Carter,* this Court declared exclusive representation unconstitutional. Since then, it has not overruled, qualified, or questioned the vitality of these opinions on the subject. In numerous other decisions, this Court has held that equality of legal opportunity to participate in the political process is a fundamental principle of constitutional government. And it has never overruled, qualified, or questioned the vitality of these opinions, either.

At trial in this case, the parties' expert witnesses in labor and industrial relations, political economy, political science, and political theory unanimously testified that PELRA's exclusive-representation provisions are equivalent to analogous provisions in the statutes this Court invalidated in *Schechter* and *Carter.* The witnesses also agreed that PELRA's exclusive-representation scheme provides MCCFA with more political influence than other citizens have over public-policy decisionmaking in the community colleges.

In the context of these facts, and under *Schechter, Carter,* and this Court's political-equality decisions, exclusive representation is unconstitutional, because it infringes governmental and popular sovereignty. As MCCFA's monopolistic privilege to "meet and confer" with the Board derives from MCCFA's status as exclusive representative in the colleges, PELRA's "meet-and-confer" scheme is unconstitutional, too.

Should this Court acquiesce by silence in the District Court's ruling that exclusive representation is constitutional notwithstanding *Schechter, Carter,* and the political-equality cases, it will encourage the legislative allies of private special-interest groups at both the state and national levels increasingly to delegate governmental power to such groups, restructuring the American economy and political process along the corporative-state lines of Italian fascism.

ARGUMENT

Under PELRA, although "[a] public employer is not required to meet and negotiate on matters of inherent managerial policy", public employees "who are professional employees" have the right, and public employers have the obligation, to "meet and confer" to discuss all "policies and matters" not included within the category "terms and conditions of employment".[20] The statute defines "meet and confer" as "the exchange of views and concerns between employers and their respective employees".[21] Thus, PELRA ex-

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[20] Minn. Stat. § 179.66, subd. 1; Minn. Stat. §§ 179.65, subd. 3; 179.66, subd. 3. *See* Minn. Stat. § 179.63, subd. 18.

[21] Minn. Stat. § 179.63, subd. 15.

tends to "professional employees", such as Knight, a broad privilege of access to their employers to discuss potentially every subject touching on their employment, excepting only those within the purview of PELRA's "meet-and-negotiate" provisions.[22] However, PELRA then restricts this access by declaring that "[t]he employer shall not * * * meet and confer with any employee * * * except through the exclusive representative".[23] Overall, therefore, PELRA creates two interrelated fora to which exclusive representatives have sole access, and through which they can control or influence the course of public-policy decision-making: (i) "meet and negotiate", covering "terms and conditions of employment"; and (ii) "meet and confer", covering everything else.

In *Perry Education Association* v. *Perry Local Educators' Association,* this Court sustained a school district's policy of granting an exclusive representative monopolistic access to teachers' mailboxes and the interschool mail system, on the ground that the representative had "assumed an official position in the operational structure of the * * * schools, and obtained a status that carried with it rights and obligations that no other labor organization could share".[24] *Perry,* however, neither held that the exclusive representative's "official position" and "status" themselves were constitutional, nor even referred to any previous decision of this Court so holding. Instead, it simply *assumed* the legitimacy of the representative's "status", and

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[22] Minn. Stat. § 179.63, subd. 10; Minn. Stat. § 179.63, subds. 16, 18.

[23] Minn. Stat. § 179.66, subd. 7.

[24] —— U.S. ——, —— n.9, 103 S. Ct. 948, 957 n.9 (1983).

blinked the impropriety of a governmental delegation of an "official position" to a self-interested private group.

Here, PELRA grants MCCFA monopolistic access to the "meet-and-confer" process as a consequence of MCCFA's "official position" and "status" as exclusive representative in the community colleges. For that reason, Knight and the other faculty-members agree that MCCFA's "status" is relevant to the constitutionality of "meet and confer". But they deny that that "status" supports the system's validity. Rather, "meet and confer" is unconstitutional *precisely because it rests on MCCFA's "official position" and "status" as exclusive representative.* For exclusive representation itself is unconstitutional in public employment—as the record in this case proves, and as every opinion of this Court on the subject holds.

I. In *Schechter* and *Carter*, this Court unequivocally condemned exclusive representation as an unconstitutional delegation of governmental power to private groups, and has neither explicitly overruled those decisions, nor articulated any rationale for sustaining exclusive representation in private or public employment.

After full consideration in *Schechter* and *Carter,* this Court held exclusive representation unconstitutional without dissenting voice. Since then, the Court has not overruled, qualified, or even questioned the continuing vitality of those opinions on the subject. Neither has it explicitly advanced any theory of constitutional law rationally capable of sustaining exclusive representation in private, and particularly in public, employment.

A. In *Schechter* and *Carter*, this Court denounced exclusive representation as "legislative delegation in its most obnoxious form", that is "utterly inconsistent" with the Constitution and "intolerable".

The National Industrial Recovery Act (NIRA) authorized private "trade or industrial associations or groups" to apply for presidential approval of "codes of fair competition for the trade or industry * * * represented by the * * * applicants", made these codes "the standards of fair competition for [each] such trade or industry" upon the President's approval, and imposed sanctions against violations thereof.[25] The statute also required "[e]very code of fair competition" to contain provisions for organization of unions and collective bargaining within the particular trade or industry, and gave "the standards established in [collective-bargaining] agreements * * * the same effect as a code of fair competition".[26] The sole substantive requirement on the private "associations or groups" privileged to act as exclusive representatives of their respective trades or industries was that they "impose no inequitable restrictions on * * * membership * * * and are truly representative of such trades or industries".[27]

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[25] Act of 16 June 1933, ch. 90, § 3(a, b, f), 48 Stat. 195, 196, 197. The President could also promulgate codes *sua sponte*. § 3(d), 48 Stat. at 196.

[26] § 7(a, b), 48 Stat. at 198-99.

[27] § 3(a), 48 Stat. at 196. *Compare* the so-called "duty of fair representation" that this Court later imposed on unions acting as exclusive representatives under the Railway Labor and National Labor Relations Acts. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

NIRA thus fit perfectly into the corporative-state form of economic-*cum*-political organization: (i) The national government recognized private groups, organized on the basis of exclusive representation, as the "spokesmen" for employers and employees in particular branches of production. And (ii) it empowered these groups to enact codes, through collective bargaining and otherwise, binding on all members of the industry after approval by executive officials.[28]

In *Schechter*, this Court unanimously declared NIRA an unconstitutional delegation of legislative power under the Due Process Clause of the Fifth Amendment to the United States Constitution. To the government's argument that the codes were valid because they "consist of rules of competition deemed fair for each industry by representative members of that industry * * * most vitally concerned and most familiar with its problems", the Court retorted:

> [W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for * * * their trades or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? * * * The answer is obvious. *Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.*[29]

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[28] *See* T. at 1289-92, 1311-12, 1321-23, 1343, 1348-51, 1353, 1401-02, 1493 (testimony of Professor Krauss); 5616-25, 5633 (testimony of Dr. Bradley).

[29] 295 U.S. at 537 (emphasis supplied).

Following the pattern of NIRA, the Bituminous Coal Conservation Act (BCCA) authorized the organization of private "district boards of coal producers" as exclusive representatives for their segments of the industry, empowered these boards to fix prices and regulate "the sale and distribution of coal by code members within the district[s]" subject to approval by a commission of the national government, and imposed sanctions on dissenters.[30] The act also mandated collective bargaining "between representatives of producers * * * and representatives of the majority of mine workers [in each district]" to fix terms and conditions of employment.[31]

Again, BCCA fit the corporative-state pattern in all particulars: (i) The national government sponsored specially privileged private groups acting as the "spokesmen" for various segments of the coal industry. (ii) It authorized these groups to promulgate generally applicable codes. And (iii) it based the entire scheme on systems of exclusive representation for employers and employees alike.[32]

In *Carter,* this Court declared BCCA an unconstitutional delegation of legislative power. Referring spe-

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[30] Act of 30 August 1935, ch. 824, §§ 3, 4, Pt. I(a), 4, Pt. II(a, b, e), 5(b, c), 49 Stat. 991, 993-98, 1002-03.

[31] § 4, Pt. III, 49 Stat. at 1001-02, *especially* Pt. III(g), 49 Stat. at 1002.

[32] *See* T. at 1311-12, 1321-22, 1339-40, 1341-43, 1352-53, 1401-02, 1493-94 (testimony of Professor Krauss); 5177, 5231-33, 5237-38 (testimony of Professor Derber); 5616-25, 5633 (testimony of Dr. Bradley).

cifically to the exclusive-representation labor-provisions of the statute, the Court said:

> The effect, in respect of wages and hours, is to subject the dissentient minority * * * of * * * miners * * * to the will of the * * * majority * * *.
>
> The power conferred upon the majority is * * * the power to regulate the affairs of an unwilling minority. *This is legislative delegation in its most obnoxious form;* for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. * * * [*A*] *statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.*[33]

And, as Chief Justice Hughes added,

> [t]he [exclusive-representation] provision permits a group of * * * employees, according to their own views of expediency, to make rules as to hours and wages for other * * * employees who are not parties to the agreements. Such a provision, apart from the mere question of delegation of legislative power, is not in accord with the requirements of due process of law.[34]

Thus, *Schechter* and *Carter* held, *without dissenting voice,* that government may not constitutionally require private persons to submit even their merely economic affairs to the control of exclusive representatives selected from among other private persons in the

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[33] 298 U.S. at 311 (emphasis supplied).

[34] *Id.* at 318 (concurring opinion).

same industry or employment, notwithstanding that the highest public officials in the land supervise the selection and decisions of the representatives.[35] And the holdings in *Schechter* and *Carter* are as directly relevant to every form of governmentally imposed exclusive representation, and as intellectually valid and legally vital, today as when this Court enunciated them nearly half a century ago.[36]

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[35] NIRA empowered the President and his subordinates to approve, disapprove, or impose conditions on the approval of codes prepared by "trade or industrial associations or groups", or to prescribe such codes themselves. §§ 2(a, b), 3(a, d), 4(a), 7(b, c), 48 Stat. at 195-96, 196, 197, 199. *Schechter* made clear, however, that even Congress could not constitutionally authorize private parties to enact such codes as exclusive representatives. 295 U.S. at 537.

BCCA empowered administrative agencies of the national government to approve, disapprove, modify, or fix outright codes for the production and marketing of coal. §§ 2(a), 4, Pt. I(a), Pt. II(a-c), Pt. III(c-g), 49 Stat. 992, 994-95, 995-98, 1001-02. *Carter* did not consider this purported "safeguard" relevant, however.

Where, as in public employment, *political* as well as economic matters are involved, these decisions should have a peculiarly compelling force. *See* Abood, 431 U.S. at 227-30 (opinion of Stewart, J.), 243 (Rehnquist, J., concurring), 252-53, 256-59 (Powell, J., concurring in the judgment) (commenting on political nature of public-sector employment, unionism, and collective bargaining).

[36] The *Carter* Court premissed its holding on *Schechter*, and on the earlier decision in *Washington* ex rel. *Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), and *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912). 298 U.S. at 311-12. Since then, these cases have received approbation in many opinions. *E.g.*, Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677-78 (opinion of the Court), 683 & n.5 (Stevens, J., dissenting) (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 6-7 (1974); National Cable

B. No opinion of this Court has overruled, qualified, or even questioned the continuing vitality of *Schechter* and *Carter* on the subject of exclusive representation; or advanced any theory of constitutional law rationally capable of upholding exclusive representation in private or public employment.

After *Schechter* and *Carter*, the unconstitutionality of exclusive representation in private employment escaped judicial review on three occasions. When the validity of the National Labor Relations Act [37] was first in issue, the Labor Board selected its test-cases "intentionally [to] avoi[d] presenting the Court with [this] 'touchy' and * * * doubtful questio[n]".[38] And in *NLRB* v. *Jones & Laughlin Steel Corp.*, this Court avoided the problem of *exclusive* representation by interpreting the statute to permit individual employees to bargain directly with their employer over the terms

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Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1973); New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 125-26 & n.30 (1978) (Stevens, J., dissenting); McGautha v. California, 402 U.S. 183, 252-54 & nn.2-3, 271-73 & nn.21-22 (1971) (Brennan, J., dissenting).

Schechter and *Carter* would not reach purely voluntary arrangements adopting exclusive representation that private employers and unions negotiated under common law, or pursuant to statutory authority merely codifying common-law principles.

[37] Act of 5 July 1935, ch. 372, 49 Stat. 449, *now* 29 U.S.C. §§ 151 *et seq.* (1976).

[38] J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-1937* (1974), at 187.

and conditions of their employment.[39] Similarly, in a contemporaneous challenge to the Railway Labor Act [40] in *Virginian Railway* v. *System Federation No. 40,* the Court held that exclusive representation under that statute allowed individual contracts between the employer and its employees.[41] These holdings reflected the unanimous position of the litigants on the issue.[42] The later decision in *Steele* v. *Louisville & Nashville Railroad Co.* also pretermitted the question, by creating the "duty of fair representation"—precisely to avoid

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[39] 301 U.S. 1, 45 (1937) (act does not prevent "employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' ").

[40] Act of 20 May 1926, ch. 347, 44 Stat. 577, *now* 45 U.S.C. §§ 151 *et seq.* (1976).

[41] 300 U.S. 515, 548-49 (1937).

[42] *See* Arguments in Cases Arising Under the Railway Labor Act and the National Labor Relations Act Before the Supreme Court of the United States, February 8-11, 1937, S. Doc. No. 52, 75th Cong., 1st Sess. (1937), at 13, 33-34, 40, 88-89, 118.

Only seven years later, in cases raising issues of statutory construction alone, did this Court purport to re-interpret the National Labor Relations and Railway Labor Acts to preclude individual contracts under some circumstances. J.I. Case Co. v. NLRB, 321 U.S. 332, 334-39 (1944); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346-47 (1944). Neither of these decisions, however, reconsidered the constitutional matters discussed in *Jones & Laughlin Steel Corp.* and *Virginian Railway,* although the statutory constructions adopted in those cases predicated their constitutional holdings. *See* Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 745, 789-91 (1940).

grappling with serious problems of due process and equal protection that exclusive representation raised."[43]

In its first decision implicating exclusive representation in public employment, *City of Madison, Joint School District No. 8* v. *WERC*, this Court felt it unnecessary to define "the extent to which true contract negotiations between a public body and its employees may be regulated".[44] But it squarely held under the First and Fourteenth Amendments to the United States Constitution that "the principle of exclusivity cannot constitutionally be used to muzzle a public employee who * * * might wish to express his views about governmental decisions concerning labor relations".[45]

This year, *Perry Education Association* v. *Perry Local Educators' Association* did sustain the authority of an exclusive representative of public-school teachers to secure for itself through collective bargaining monopolistic access to the schools' mail system. But *Perry* upheld such "exclusive access" as "a permissible labor practice in the public sector" on the basis, not of any constitutional analysis of exclusive representation itself, but of a decision of a state public-employment commission, and of a "federal employment" statute and various administrative decisions construing it. Moreover, the *Perry* majority also noted that "[e]xclusive access provisions in the private sector * * * have yet to be expressly approved". And the entire decision

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[43] 323 U.S. 192, 198 (1944). *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967). *See generally, e.g.*, Weyland, "Majority Rule in Collective Bargaining", 45 *Colum. L. Rev.* 556, 568-69 (1945).

[44] 429 U.S. 167, 175 (1976).

[45] Abood, 431 U.S. at 230 (opinion of Stewart, J.).

simply *assumed* that the exclusive representative's "official position in the operational structure of the * * * schools", and its "status", were legitimate.[46]

Most recently, this Court affirmed without briefs, argument, or opinion the District Court's decision in No. 82-901. That such summary treatment of the exclusive-representation issue lacks force as precedent, and will be questioned by every thinking person conversant with the history of this subject, requires no emphasis.

In sum, no opinion of this Court has articulated a single theory of constitutional law at odds with the holdings in *Schechter* and *Carter* that condemned exclusive representation as "legislative delegation in its most obnoxious form". Avoidance of the question in *Jones & Laughlin Steel Corp.* and other cases presents no argument against its existence. Assumption of the constitutionality of exclusive representation in *Perry* adduces no proof of its validity. And summary affirmance in No. 82-901 indicates only that the Court failed to realize its opportunity to deal with this issue in the context of a record that renders possible a definitive decision.

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[46] —— U.S. ——, —— n.9, —— n.11, 103 S. Ct. 948, 957 n.9, 958 n.11 (1983).

II. The record in this case establishes that exclusive representation under Minnesota's Public Employment Labor Relations Act abridges governmental and popular sovereignty, in violation of the explicit holdings of *Schechter* and *Carter*, and of the fundamental constitutional principle of political equality that this Court has applied in numerous decisions.

Generally speaking, compulsory public-sector collective bargaining through exclusive representation transfers some measure of decisionmaking authority over public policies from public officials to private groups, delegating governmental power—and thereby sovereignty—to those groups. On this point, agreement is unanimous among commentators,[47] and even among the Judges of the District Court and the Justices of this Court.[48] Moreover, by delegating governmental sover-

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[47] *E.g.*, C. Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156, 1156, 1157, 1160 (1974) ("[t]he introduction of collective bargaining • • • in the public sector • • • restructures the political process"); R. Summers, *Collective Bargaining and Public Benefit Conferral: A Jurisprudential Critique* (Inst. of Pub. Employment, N.Y. State School of Indus. and Lab. Rel'ns, Monograph No. 7, Nov. 1976), at 3 ("[c]ollective bargaining cannot be engrafted on to [the governmental process] without redistributing power"); Wellington & Winter, "The Limits of Collective Bargaining in Public Employment", 78 *Yale L.J.* 1107, 1109 (1969) ("a great deal of shared control is implicit in any scheme of collective bargaining").

[48] Both the District Court, and this Court in *Abood*, commented that bargaining provides employees with "economic benefits" that justify imposing "agency fees" on nonmembers of the exclusive representative. Appendix, *ante* note 18, at A-11 to A-12; 431 U.S. at 221-22 (opinion of Stewart, J.). If collective bargaining *creates* benefits for some employees, though, it does so *only by altering the*

eignty to an exclusive representative, compulsory bargaining also abridges popular sovereignty for the representative's benefit. On this point, too, there is unanimity among commentators.[49] And the members

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course of public-employment policy from what it would have been absent bargaining, through the representative's ability to require the government to negotiate the substance of that policy. Now, a State's power to determine the wages, hours, and other working-conditions of its employees is "[o]ne undoubted attribute of state sovereignty". National League of Cities v. Usery, 426 U.S. 833, 845 (1976). Therefore, if *Abood* correctly sustained agency fees as payments for *special* benefits some employees receive from *and solely because of* bargaining, then (to the degree it confers such benefits) bargaining must involve a transfer of "state sovereignty" from the government to private groups. *Cf.* Abood, 431 U.S. at 243 (Rehnquist, J., concurring).

[49] *E.g.*, C. Summers, "Public Sector Bargaining: Problems of Governmental Decisionmaking", 44 *Univ. L. Rev.* 669, 674-75 (1975) (public-sector bargaining "provide[s] a special process available only to public employees", and "significantly increases the political effectiveness of public employees in determining their terms and conditions of employment • • • relative to other competing political interest groups"); C. Summers, *ante* note 47, 83 *Yale L.J.* at 1193 (public employees "already have, as citizens, a voice in decisionmaking through customary political channels. The purpose of collective bargaining is to give them • • • a larger voice than the ordinary citizen"); R. Summers, "Public Sector Collective Bargaining Substantially Diminishes Democracy", *Gov't Union Rev.*, Vol. 1, No. 1 (Winter 1980), at 8, 21 ("[t]he redistribution of governmental authority pursuant to statutes establishing collective bargaining inherently diminishes democracy"; "bargaining • • • authenticates • • • a fundamentally non-democratic mode of decisionmaking—a form of interest group syndicalism"); Lieberman, "Teacher Bargaining: An Autopsy", *The Kappan* (December 1981), at 231, 232 ("[t]hat public sector bargaining in inconsistent with democratic government is no longer in doubt").

of this Court have not been unmindful of it, either.[50]

Furthermore, the detailed *and uncontradicted* testimony of the parties' expert witnesses fully documents the effects of PELRA in particular on governmental and popular sovereignty. The experts all agreed that collective bargaining and exclusive representation under PELRA constitute a delegation of legislative power equivalent to the delegations involved in NIRA and BCCA; that this delegation of legislative authority transfers some *quantum* of governmental sovereignty from the State of Minnesota to MCCFA; and that this transfer of governmental sovereignty circumvents or supersedes popular sovereignty with respect to the formulation of public policy in the community colleges.[51]

The record thus unavoidably presents one of the most serious political-economic issues of the twentieth century: namely, *the extent to which the Constitution allows self-interested private groups to exercise legislative power over this country's economic and political processes, outside of the traditional channels of representative government.*

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[50] Abood, 431 U.S. at 229 (opinion of Stewart, J.) ("permitting • • • a union to bargain as [public employees'] exclusive representative gives the employees more influence in the decisionmaking process than is possessed by employees • • • in the private sector"), 261 n.15 (Powell, J., concurring in the judgment) (because of delegation of power to exclusive representatives, "voters • • • could complain with force and reason that their voting power and influence on the decisionmaking process ha[ve] been unconstitutionally diluted").

[51] *Ante*, pp. 3-10.

III. This Court's acquiescence in the District Court's decision sustaining exclusive representation in public employment will encourage the state and national legislatures to license private special-interest groups to dominate every aspect of this country's private economy and political process.

Summary affirmance is not a proper disposition of the truly momentous issue Knight and the other faculty-members raised in No. 82-901. Indeed, by adopting this procedure, this Court abdicates its jurisdiction and abjures its responsibility to decide basic questions of constitutional law, instead licensing three judges of an inferior court cavalierly to expunge from constitutional jurisprudence *Schechter, Carter,* and this Court's political-equality decisions, and insouciantly to rationalize whatever corporative-state arrangements pliant legislators and self-interested private groups may conspire to impose on the American public from now on.

A. By acquiescing in the District Court's assertion that *Schechter* and *Carter* are inapplicable, lack "continuing vitality", or have been overruled *sub silentio*, this Court will encourage legislatures to delegate governmental sovereignty to private special-interest groups.

The District Court's incoherent opinion reflects the logical, legal, and factual impossibility of refuting the record in this case. Having conceded what it could not deny, that PELRA does delegate governmental sovereignty to MCCFA, the District Court simply pretended that this state of affairs raises no serious question of constitutional law, because: (i) the Minnesota Legis-

lature "retains authority" over the subject-matter of the delegation; (ii) *Schechter* and *Carter* lack "continuing vitality" as prohibitions of delegations of governmental power; and (iii) *Abood* overruled *Schechter* and *Carter sub silentio* insofar as exclusive representation in public employment is concerned. For this Court to credit these rationalizations entails abandonment of the non-delegation doctrine.

1. The District Court held PELRA's delegation of sovereignty to MCCFA "not impermissibl[e]", because "[n]egotiated agreements with state employees and even arbitration awards must be 'submitted to the legislature to be accepted or rejected' ".[13] Four errors vitiate this conclusion: *First,* it begs the question—which is *not* "What power has the legislature *retained?*", but rather "What power has it *delegated* to private groups?" Even if the Minnesota Legislature itself bargained with MCCFA, it would still have committed the State (through PELRA) *to negotiate the content of public policy in the colleges with a private group,* subject to compulsory arbitration of disputes and the threat of strikes.[14] Under PELRA, the Legislature enjoys no more "retained authority" than if it negotiated directly with MCCFA.[15] Unless the

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[13] Appendix, *ante* note 18, at A-10.

[14] *See* Minn. Stat. §§ 179.63 subd. 16; 179.64; 179.65-179.67; 179.68, subd. 2; 179.69-179.70; 179.74.

[15] The Legislature's sole power is to "accep[t] or rejec[t]", but not to modify or impose, "[t]he provisions of the negotiated agreements and arbitration awards". Minn. Stat. § 179.74, subd. 5. Indeed, the Legislature's own Commission on Employee Relations "may make recommendations [concerning collective bargaining] • • • *but no recommendation shall impose any obligation or grant*

"sharing" of governmental authority with a private group by a state legislature itself is always a "permissible" delegation of sovereign power, PELRA's arrangement is self-evidently unconstitutional.[55]

Second, the District Court's reliance on "retained authority" myopically focusses on the Legislature's remote, contingent, and limited review, while blinking MCCFA's direct, immediate, and plenary influence over adoption and implementation of college policies. This Court has repeatedly held that a legislature delegates no power by authorizing some party merely to approve, disapprove, suspend, or revive the operation of a statute—because the legislature determines the original substance of the law.[56] If a *granted* power to approve or disapprove the operation of a law involves no invalid *delegation,* such a *retained* power hardly constitutes a constitutionally significant *withholding* of legislative authority. Under PELRA, MCCFA and the Board jointly negotiate the agreements the Legislature must accept or reject. These agreements have "all the attributes of legislation for the subjects with

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any right or privilege to the parties". Minn. Stat. § 3.855, subd. 2 (emphasis supplied). Moreover, under some circumstances, the Commission may give "interim approval" to a "proposed agreement or arbitration award" that has been "rejected or • • • not approved by the legislature". Minn. Stat. § 179.74, subd. 5.

[55] *See* Schechter, 295 U.S. at 537 (congressional "delegation of legislative power [to private groups] is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress").

[56] *E.g.,* Currin v. Wallace, 306 U.S. 1, 15-16 (1939); Union Bridge Co. v. United States, 204 U.S. 364, 377-87 (1907); Field v. Clark, 143 U.S. 649, 681-83 (1892).

which [they] dea[l]".[57] The *real* lawmaking, then, derives from MCCFA's negotiations, not the Legislature's tardy approval thereof.

Third, the District Court's decision forgets that this Court long ago rejected the "retained-authority" defense. Under NIRA and BCCA, executive and administrative officials of the national government could approve, disapprove, modify, or establish themselves the codes the statutes licensed private groups to promulgate.[58] Nevertheless, *Schechter* and *Carter* condemned the delegations of legislative power to those groups as "utterly inconsistent" with the Constitution and "intolerable".[59]

Fourth and last, the District Court's ruling logically obliterates the non-delegation doctrine. For all *delegations*, as opposed to *abdications*, of legislative power implicitly assume the legislature's reservation of authority to revoke its grant, if only by repeal of the statute itself. An explicit statement of this "retained authority" adds nothing. Therefore, if mere "retained authority" immunizes *any* delegation of legislative power to private groups, then *all* such delegations—being rationally indistinguishable in this particular—are *always* constitutional.

For the District Court's decision to stand, then, this Court must join with it in expunging the non-delegation doctrine from constitutional law.

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[57] Abood, 431 U.S. at 252-53 (Powell, J., concurring in the judgment).

[58] NIRA §§ 2(a, b), 3(a, d), 4(a), 7(b, c), 48 Stat. at 195-96, 196, 197, 199; BCCA §§ 2(a), 4, Pt. I(a), Pt. II(a, c), Pt. III(c-g), 49 Stat. at 992, 995-95, 995-98, 1001-02.

[59] Schechter, 295 U.S. at 537; Carter, 298 U.S. at 311.

2. Sensing the absurdity of its "retained-authority" thesis in light of *Schechter* and *Carter,* the District Court disparaged their "continuing vitality" as "doubtful at best".[60] As recent opinions of this Court illustrate, the non-delegation doctrine of *Schechter* and *Carter* remains the law.[61] And the uncontradicted testimony of Professors Derber and Krauss, and Dr. Bradley, proves the materiality of that doctrine to the facts

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[60] Appendix, *ante* note 18, at A-10 to A-11.

[61] Industrial Union Dep't, AFL-CIO v. American Petrol. Inst., 448 U.S. 607, 646 (opinion of Stevens, J.), 664 n.1 (Powell, J., concurring in part and in the judgment) (1980); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340-42 (1973); United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring in the result). *See also* cases in which Justices have asserted the nondelegation doctrine in circumstances where the majority saw no delegation problem. New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 125-26 (1978) (Stevens, J., dissenting); California Bankers Ass'n v. Schultz, 416 U.S. 21, 90-91 (1974) (Douglas, J., dissenting); McGautha v. California, 402 U.S. 183, 252-54 & nn.2-3, 271-73 & n.21 (1971) (Brennan, J., dissenting); Zemel v. Rusk, 381 U.S. 1, 21-22 (1965) (Black, J., dissenting); Arizona v. California, 373 U.S. 546, 625-26 (1963) (Harlan, J., dissenting); United States v. Sharpnack, 355 U.S. 286, 297-98 (1958) (Douglas, J., dissenting).

Furthermore, two other decisions on which *Carter* relied, *Washington* ex rel. *Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116, 121-22 (1928), and *Eubank* v. *City of Richmond,* 226 U.S. 137, 143 (1912), have also received continuing approbation. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677-78 (opinion of the Court), 683 & n.5 (Stevens, J., dissenting) (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 6-7 (1974); New Motor Vehicle Bd. of California, *ante,* 439 U.S. at 125-26 n.30 (Stevens, J., dissenting); McGautha, *ante,* 402 U.S. at 254 n.3, 272-73 & n.22 (Brennan, J., dissenting).

of this case.[42] For the District Court's decision to stand, then, this Court must join with it in eviscerating *Schechter* and *Carter,* with all the far-reaching political-economic consequences that action entails.

3. Attempting to avoid *Schechter* and *Carter* altogether, the District Court fantasized that "*Abood* squarely upholds the constitutionality of exclusive representation bargaining in the public sector".[43] This is a five-fold misrepresentation: *First,* exclusive representation was not at issue in *Abood.* The complaints did not challenge it.[44] The lower courts did not rule on it.[45] The parties did not contest it before this Court,[46] but instead agreed that the "appeal * * * does not raise the question".[47] And the *Abood* plurality defined the problem as "whether [an agency-shop] arrangement violates * * * constitutional rights", holding that "[a]ll

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[42] The testimony of both Krauss and Derber rested in large measure on review of this Court's opinions in *Schechter* and *Carter.* T. at 1334-35, 5189-91.

[43] Appendix, *ante* note 18, at A-11.

[44] Appendix to Brief for Appellants, Abood v. Detroit Bd. of Educ., No. 75-1153 (U.S. Sup. Ct., filed 2 July 1976), at 6-15, 39-52. *See* 431 U.S. at 213 (opinion of Stewart, J.).

[45] Appendix to Brief for Appellants in *Abood,* at 94-104. *See* 431 U.S. at 215 (opinion of Stewart, J.).

[46] Jurisdictional Statement in *Abood* (filed 13 Feb. 1976), at 6; Brief for the Appellants in *Abood* (filed 9 July 1976); at 4; Brief for Appellees in *Abood* (filed 10 Sept. 1976), at x.

[47] Brief for the Appellants in *Abood,* at 148. "[T]he states are free to adopt * * * exclusive representation (*which appellants do not challenge*) * * *." Brief for Appellees in *Abood,* at 34 (emphasis supplied).

we decide is that * * * the complaint * * * establish[es] a cause of action" with respect to the agency shop.[68]

Second, no opinion in *Abood* addressed exclusive representation. The plurality invoked the representative's "various responsibilities" as rationalizing the agency shop—without referring to any decision sustaining the delegation of bargaining-privileges to a private organization in the public sector.[69] Justice Powell noted that a "collective bargaining agreement to which a public agency is a party * * * has all the attributes of legislation", and warned that "voters * * * could complain * * * that their voting power and influence on the [governmental] decision making process had been unconstitutionally diluted" by delegation to a private group of power to participate in making such economic laws—but he, too, refrained from any constitutional judgment.[70] Justices Rehnquist and Stevens said nothing on the subject. And the parties themselves reserved, or remained silent on, the delegation-question.[71]

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[68] 431 U.S. at 211, 236-37 (opinion of Stewart, J.). *Accord, id.* at 217, 224-25 (opinion of Stewart, J.).

[69] 431 U.S. at 224-25 (opinion of Stewart, J.). The plurality merely accepted as unchallenged the State's "determin[ation] that labor stability will be served by a system of exclusive representation". *Id.* at 229 (opinion of Stewart, J.).

[70] 431 U.S. at 252-53, 262 n.15 (opinion concurring in the judgment).

[71] Appellants in *Abood* noted the relevance of *Schechter, Carter,* and *Lathrop* v. *Donohue,* 367 U.S. 820 (1961), to the delegation-of-power problem. But they disclaimed any intent to "advert to the controlling nature of these decisions on the issue of exclusive representation", because "[i]t is not our purpose to raise the[se]

Third, the sole constitutional precedent subtending *Abood's* decision on the agency shop, *Railway Employes' Department* v. *Hanson,*[73] had nothing to do with exclusive representation. The *Abood* plurality cited *Hanson* only in connexion with the agency shop.[74] And the Court of Appeals heretofore in this case held *Hanson* irrelevant to exclusive representation.[75]

Fourth, the record in Abood lacked "factual concreteness and adversary presentation" even with respect to the agency shop.[76] Any "holding" regarding exclusive representation, then, could have amounted only to an advisory opinion, improper under Article III of the Constitution.[77]

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constitutional conundrums". Brief for the Appellants in *Abood,* at 126. Appellees' brief contained no reference to *Schechter* or *Carter* at all. *See* Brief for Appellees in *Abood,* at iv-viii.

Not surprisingly, then, the *Abood* plurality also ignored *Schechter* and *Carter,* and acknowledged *Lathrop* only to note that that decision "does not provide a clear holding to guide us in adjudicating the constitutional questions here presented". 431 U.S. at 233 n.29 (opinion of Stewart, J.). *Contrast* Lathrop, 367 U.S. at 853-55 (opinion of Harlan, J.), 878 n.1 (opinion of Douglas, J.) (discussing the relevance of *Schechter*). This silence would depart radically from traditional principles of constitutional adjudication if, as the District Court erroneously implied, *Abood* "overruled" *Schechter* and *Carter* on the delegation-issue.

[73] 351 U.S. 225 (1956).

[74] 431 U.S. at 215, 217 n.10, 222 (opinion of Stewart, J.).

[75] Knight v. Alsop, 535 F.2d 466, 470-71 (8th Cir. 1976).

[76] 431 U.S. at 236 (opinion of Stewart, J.). *Accord, id.* at 244 & n.* (Stevens, J., concurring).

[77] *See, e.g.,* United Pub. Workers v. Mitchell, 330 U.S. 75, 89-91 (1947).

Fifth and last, the *Abood* plurality itself compellingly distinguished the agency-shop issue there from that of exclusive representation here. Assuming the constitutionality of exclusive representation, appellants in *Abood* attacked only the requirement of financial support therefor. Because "[p]ublic employees are not basically different from private employees" with respect to unions, the plurality upheld the agency shop, relying on the private-sector case, *Hanson.*[11] Here, Knight and the other faculty-members challenge exclusive representation itself, because it delegates public authority to, and abridges popular sovereignty for the benefit of, a private group. Thus, unlike *Abood,* this case hinges on "[t]he very real differences between * * * bargaining in the public and private sectors", particularly that " '[t]he uniqueness of public employment * * * is in the special character of the employer' ", government."[12]

In sum, *Abood* is irrelevant because: the record there did not frame the exclusive-representation issue; the parties did not present, argue, or even contest the matter; resolution of the question was unnecessary for the Court's decision; and none of the opinions even described, let alone analyzed or solved, the legal problems present here.[13] For the District Court's decision

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[11] 431 U.S. at 230-31, 232 (opinion of Stewart, J.).

[12] *Id.* at 230 (opinion of Stewart, J.), *quoting* C. Summers, "Public Sector Bargaining: Problems of Governmental Decisionmaking", 44 *Cinn. L. Rev.* 669, 670 (1975). For this reason, even if relevant, *Abood* would not control here. *See, e.g.,* Quong Wing v. Kirkendall, 223 U.S. 59, 63-64 (1912).

[13] *Compare and contrast* United States v. Mitchell, 271 U.S. 9, 14 (1926), *and* Webster v. Fall, 266 U.S. 507, 511 (1925) (previous

to stand, then, this Court must join with it in perverting *Abood* beyond recognition.

Of course, a summary affirmance does not necessarily signify that this Court agrees with every jot of the reasoning of the tribunal the judgment of which it sustains.[50] None the less, in light of the unequivocal record in this case, every informed observer will be justified in interpreting this Court's disposition of No. 82-901 as a concession by silence that the Court will countenance wholesale delegations of governmental sovereignty to private special-interest groups.

How well the American public sector will function after these self-interested groups have usurped whatever governmental sovereignty their political influence enables them to seize is not difficult to predict. As Professor Krauss and Dr. Bradley explained at trial, insinuation of corporative-state arrangements into public employment will increasingly misallocate resources, disrupt labor peace, and generate rationally insoluble political conflicts among mutually antagonistic interest-groups.[51] Presumably, this Court decries such results. Yet its summary disposition of No. 82-901 will encourage state and national legislators to create or expand corporative-state institutions the operations of which can bring about no other state of affairs.

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decision not precedent on "question not raised by counsel • • • merely because it existed in the record and might have been raised").

[50] *E.g.*, Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979).

[51] T. at 1292-99, 1302-04, 1420-26, 1360, 1363-64, 1380-85, 1300, 1372-76, 1428 (testimony of Professor Krauss); 5653-55, 5633-40 (testimony of Dr. Bradley).

B. By acquiescing in the District Court's contention that the extraordinary political prerogatives of an exclusive representative in public employment have "no constitutional significance", this Court will embolden legislatures to undermine popular sovereignty for the benefit of private special-interest groups.

As noted above, by delegating governmental sovereignty to MCCFA, PELRA also abridges popular sovereignty for that private organization's benefit. In a mere footnote to its opinion, however, the District Court held that the unequal political influence MCCFA enjoys through its unique legal privilege to "meet and negotiate" concerning college employment-policies has "no constitutional significance".[82]

Exactly the opposite is true: Equally foreign to the Constitution are the notions that government may enhance the speech of one group in order to attenuate the relative voices of others, or distort its decision-making processes in order to benefit one group at everyone else's expense.[83] Indeed, even "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees".[84] Yet PELRA grants MCCFA a monopoly, not simply to express its views, but also to compel the Board to negotiate and confer over those views, and to enter

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[82] Appendix, *ante* note 18, at A-14 n.8.

[83] *See, e.g., mutatis mutandis,* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790-92 (1978); Washington v. Seattle School Dist. No. 1, —— U.S. ——, ——, 102 S. Ct. 3187, 3193-95 (1982).

[84] City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 175-76 (1976) (footnote omitted).

into agreements that have "all the attributes of legislation for the subjects with which [they] dea[l]".[85]

The essence of compulsory bargaining under PELRA is MCCFA's monopolistic political control or influence over governmental decisionmaking in the colleges. This Court, however, has ruled repeatedly in other contexts that such political discrimination is unconstitutional, even if it promotes or defeats "good" or "bad" political views; balances political power among competing interest-groups; encourages "political stability"; solves "practical [political] problems"; aids or hinders particular economic, social, or other non-political interests; recognizes the "special pecuniary or other interest" of some group in a governmental decision; takes employment-status into account; or even satisfies the demands of majorities.[86] No rational—let alone legal, politically sound, or moral—basis exists for relaxing this precept of democratic government on behalf of a private, self-interested organization such as MCCFA.[87]

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[85] Abood, 431 U.S. at 252-53 (Powell, J., concurring in the judgment).

[86] Cipriano v. City of Houma, 395 U.S. 701, 704-06 (1969); Carrington v. Rash, 380 U.S. 89, 93-94 (1965); Davis v. Mann, 377 U.S. 678, 691-92 (1964); Gray v. Saunders, 372 U.S. 368, 379-80 (1963); Williams v. Rhodes, 393 U.S. 23, 31-32 (1968); Kirkpatrick v. Priesler, 394 U.S. 526, 533 (1969); Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 736-37, 738 & n.31 (1964); City of Phoenix v. Kolodziejski, 399 U.S. 204, 208-10 (1970); Evans v. Cornman, 398 U.S. 419, 4[illegible]26 (1970); Kramer v. Union Free School Dist., 395 U.S. 621, 630-33 (1969); Harper v. Board of Elections, 383 U.S. 663, 666 (1966).

[87] *See, e.g.*, Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 273-74 (1936) (naked attempt to give "economic advantage" to

For the District Court's decision to stand, then, this Court must join with it in prostituting the political process in a way unknown in American history and violently at odds with the first principles of republicanism."

Indeed, summary affirmance in No. 82-901 rationally imports nothing less than that the doctrine of political equality has no place where legislatures agree to "negotiate" or "confer" about public policies with private special-interest groups to the exclusion of all other citizens. Perhaps this Court can explain why, after all, it is *not* true that, "[i]f power to determine school policy were shifted in part from officials elected by the population of the school district to officials elected by the school board's employees, the voters of the district could complain with force and reason that their voting power and influence on the decisionmaking process had been unconstitutionally diluted".[39] But, if such an explanation exists, someone should present it frankly to the American people.

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one private group is unconstitutional discrimination). Certainly, where political discrimination is involved, the District Court's "retained-authority" apology is meritless. *See* Washington v. Seattle School Dist. No. 1, —— U.S. ——, ——, 102 S. Ct. 3187, 3198-200 (1982); Crawford v. Board of Educ. of City of Los Angeles, —— U.S. ——, ——, 102 S. Ct. 3211, 3226 (1982) (Marshall, J., dissenting).

[38] *See The Federalist* No. 10, *applied to this issue in* E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (1980).

[39] Abood, 431 U.S. at 261 n.15 (Powell, Jr., concurring in the judgment).

C. The logical consequence of acquiescing in the District Court's decision sustaining exclusive representation is for this Court implicitly to concede that the Constitution licenses legislatures to create throughout American society corporative-state arrangements that parallel Italian fascism.

This Court can take no consolation in the errant hope that its summary disposition of No. 82-901 involves only the narrow field of "public employment", "labor relations", or "terms and conditions of employment". To the contrary: Its action logically extends to every aspect of American economic and social life.

The District Court held that a legislature violates no constitutional provision by granting a private group the power to require public officials to negotiate the content of public policy respecting "terms and conditions of employment" in the community colleges. But the power to determine "terms and conditions of employment"—including wages, hours, and kindred matters—for public employees is "[o]ne undoubted attribute of state sovereignty".[90] If a legislature may uniquely empower private group *A* to "meet and negotiate" and "meet and confer" concerning "[o]ne undoubted attribute of state sovereignty", it may similarly empower private groups *B, C, D,* and so on to "negotiate" and "confer" on every other such attribute. Rightly or wrongly,[91] this Court has held that the na-

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[90] National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

[91] *See, e.g.,* B. Siegan, *Economic Liberties and the Constitution* (1980); Vieira, "Rights and the United States Constitution: the Declension From Natural Law to Legal Positivism", 13 *Georgia L. Rev.* 1447, 1475-94 (1979).

tional and state legislatures have virtually unlimited power to regulate "economic" and "social" matters. Each area of regulatory authority constitutes an "attribute of [governmental] sovereignty". Therefore, on the strength of the District Court's decision, as affirmed in No. 82-901, *every* "economic" and "social" question in American life is potentially the subject of a separate, monopolistic system of "negotiation" and "conference" between public officials, on the one side, and some politically influential private special-interest group, on the other. In short, under color of this Court's decision-by-default in No. 82-901, *all* of American society can be re-structured along NIRA corporative-state lines, *as certain groups are already advocating in the name of "industrial policy".*[92]

Thus, under color of this Court's decision-by-default in No. 82-901, the United States could soon find itself, once again, aping the *opera buffa* political economy of fascist Italy! For, certainly, if the Constitution permits the State of Minnesota to impose PELRA's "meet-and-negotiate" and "meet-and-confer" systems on public employees such as Knight, it also permits establishment (at either the state or national level) of the full-blown fascist system—both PELRA and the Italian corporative state being, from the perspective of political economics, identical in structure.[93]

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[92] *See, e.g.*, R. Marshall, *et alia, An Economic Strategy for the 1980s: The Failure of Reagonomics and the Full Employment Alternative* (1982), at 44-47, *in* Appendix hereto.

[93] As Professor Krauss explained at trial, the corporative-state structure of Italian fascism was "identical to the structure [of NIRA] in the Schechter case", from which structure PELRA evolved. T. at 1357-58. Indeed, the connexion between NIRA and

As is common knowledge,

> the corporate state is a view of society that sees the community as composed of diverse economic or functional groups * * *; in theory it would make the basic governmental unit the group or corporate body rather than the individual. Members of the central governing body would represent specific functional groups * * *.
>
> Corporativism was an important feature of Italian fascism * * * [in which] the corporate organization evolved out of the peculiar Fascist unions, or syndicates * * *."

More specifically, as under PELRA, "[f]ascist legislation recongise[d] certain Occupational Associations as * * * officially representing a category of workers".[93] "The establishment of these associations may be regarded as the first practical result on a large scale of the corporative policy * * *."[94] Under the Italian system, as under PELRA, these "legally recognised associations enjoy[ed] important privileges which assure[d] them a fundamental influence in the economic and political life of the country and, at the same time,

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Italism fascism is historically notorious, even to non-economists. *See, e.g.*, "Notable and Quotable", Wall Street J., 29 October 1980, at 28, cols. 4-5, *quoting* Vice President Henry A. Wallace describing "[t]he setup in [NIRA]" as "a type of fascism", and Secretary of Labor Frances Perkins equating NIRA with "the corporate state" of Italian fascism.

[93] 6 *Encyclopaedia Britannica*, "Corporate State", 524 (1963 ed.).

[94] F. Pitigliani, *The Italian Corporative State* (1933), at 20. *Compare* Minn. Stat. §§ 174.63, subds. 5-6; 179.65. subd. 2; 179.67.

[95] F. Pitigliani, *ante* note 95.

financial independence".[97] Of most immediate consequence, each "syndical organization recognized by the government acquire[d] juridical personality and the exclusive right of representing all workers * * * within its occupational * * * jurisdiction in making collective contracts governing labor conditions".[98] Indeed, just as under PELRA, central and essential to the entire Italian system was exclusive representation: The privilege "of existing as a separate legal entity and of representing all the members of a given occupational group whether they belong to the syndicate or not, [was] the fundamental prerogative of the Fascist syndical association".[99] Through their official positions and status as exclusive representatives, these "legally recognized occupational associations ha[d] a control over the economic life of the country, inasmuch as they regulate[d] by means of collective labour contracts * * * the demand and supply of labour, the remuneration of every category of workers * * *, and

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[97] *Id.* at 23. *Compare* Minn. Stat. §§ 179.65, subd. 4; 179.66, subds. 3-4, 7.

[98] G. L. Field, *The Syndical and Corporative Institutions of Italian Fascism* (1938), at 69. Typical are the following provisions of fascistic law: "Only one [syndical] association for each class of * * * workers * * * shall be recognized by law." Law of 3 April 1926, No. 563, On the Legal Discipline of Collective Labor Relations, art. 6. "[O]nly a syndicate legally recognized * * * has the right legally to represent the entire class of * * * workers for which it has been formed, * * * to negotiate collective labor agreements binding upon all members of that class, to levy contributions and to exercise such functions of public interest as may be delegated to it." Charter of Labor, art. III. *Compare* Minn. Stat. § 179.66, subd. 7.

[99] W. Welk, *Fascist Economic Policy* (1938), at 76.

the standards according to which production [was] carried on".[100] The "collective trade agreements * * * constitute[d] the disciplinary factor in the corporative economy", and embodied "[t]he most striking results of the work of these [Occupational] Associations".[101] As under PELRA, "[a] quasi-legislative character [was] imputed to the negotiation of collective labor contracts by the official syndicates, * * * since the contracts * * * [were] binding upon others than the actual members of the associations contracting".[102] Moreover, as under PELRA, "[o]nly the legally recognised associations [in the Italian fascist system] ha[d] the right to nominate the representatives * * * of the workers * * * on the organs or councils on which such representation [was] contemplated by the laws".[103] And, as under PELRA, only these associations had

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[100] F. Pitigliani, *ante* note 95, at 23.

[101] *Id.* at 23, xi.

[102] G. L. Field, *ante* note 98, at 100. *See* Law of 3 April 1926, No. 563, On the Legal Discipline of Collective Labor Relations, art. 10: "Collective labor agreements, negotiated by legally recognized [syndical] associations of * * * employees, shall apply to all the * * * employees * * * of the professional class to which the collective arrangement refers and whom such associations represent * * *."

Compare Steele v. Louisville & N.R.R., 323 U.S. 192, 198, 202 (1944) ("the [exclusive] representative is clothed with power not unlike that of a legislature"), *with* Abood, 431 U.S. at 252-53 (Powell, J., concurring in the judgment) ("collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all of the attributes of legislation for the subjects with which it deals").

[103] F. Pitigliani, *ante* note 95, at 24. *Compare* Minn. Stat. §§ 179.65, subd. 1; 179.66, subd. 7.

"the right to levy an annual contribution on all the persons represented by them, whether members or not".[104]

This Court's decision-by-default in No. 82-901, then, will evidence to every thinking person the judiciary's acquiescence in "the first practical result on a large scale of the corporative policy", through the establishment of compulsory collective bargaining and exclusive representation in public employment. This acquiescence will inevitably embolden the partizans of corporativism in every area of economic and social activity to demand increasing delegation to private special-interest groups of "control over the economic life of the country", through "collective agreements" of one sort or another. And, worst of all, this acquiescence will color the legitimacy of corporative-state institutions, even though neither Appellants nor the District Court offered a rational constitutional theory in support of the PELRA's "meet-and-negotiate" provisions, and notwithstanding that *Schechter, Carter,* and this Court's political-equality cases have already declared impossible the fashioning of such a doctrine.

Under these circumstances, it is naive to advise that, "[f]or protection against abuses by Legislatures[,] the people must resort to the polls, not to the courts".[105] For compulsory public-sector collective bargaining through exclusive representation subverts the processes of representative government, discriminatorily enhancing the political power and influence of the private

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[104] F. Pitigliani, *ante* note 95, at 25. *Compare* Minn. Stat. § 179.65, subd. 2.

[105] Munn. v. Illinois, 94 U.S. 113, 134 (1877).

special-interest groups granted the status of exclusive representatives, at the expense of all other citizens.[106] Therefore, even if the people were aware of what is actually at stake with respect to exclusive representation, the more that system perversely insinuates itself into the fabric of public employment, the less they can effectively "resort to the polls" for redress. In fact, however, with this Court's summary affirmance in No. 82-901, *the people are not aware of what is going on precisely because the Court has kept them in ignorance.*

Perhaps some as-yet-unarticulated re-interpretation of constitutional law supports this Court's silent abandonment of *Schechter* and *Carter,* and its apparent embracement of corporative-state principles. Or, perhaps some as-yet-undisclosed revision of constitutional history illuminates the true character of the Founding Fathers as the "Founding Fascists", who anticipated by almost a century and a half the economic acumen, statecraft, and concern for individual liberty of *Il Duce* Benito Mussolini. But, if such a re-interpretation or revision does exist, this Court has at least a moral responsibility to present it explicitly to the American people, that they can recognize the true nature of their governmental institutions, and act intelligently on the basis of that knowledge.

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[106] R. Summers, "Public Sector Collective Bargaining Substantially Diminishes Democracy", *Gov't Union Rev.*, Vol. 1, No. 1 (Winter 1980), at 5; E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (1980).

IV. The integrity of the process of judicial review demands that this Court explicitly address the constitutionality *vel non* of exclusive representation, and either enforce *Schechter*, *Carter*, and its political-equality decisions, or explain candidly to the nation why, and to what extent, it deems those decisions inapplicable or overruled.

Disposing of the issue of the unconstitutionality of exclusive representation in public employment through a summary decision is unconscionable. If this Court believes the District Court correctly ruled that *Schechter* and *Carter* lack "continuing vitality", and that a grant of monopolistic political privileges to a private special-interest group has "no constitutional significance", then it should frankly explain to the American people the basis for these beliefs. For nothing the District Court wrote provides such an explanation. Or, if this Court believes that the result the District Court reached was proper for reasons other than those the latter Court stated, then it should enucleate those other reasons, rather than suffer the public to assume that the summary affirmance in No. 82-901 betokens the Court's wholehearted acceptance of corporative-state philosophy.

Otherwise, even a not-overly-cynical observer must likely conclude that: (i) This Court cannot rationally justify exclusive representation in public employment as consistent with *Schechter*, *Carter*, and its political-equality decisions. (ii) For reasons unconnected to constitutional law, this Court desires to sustain exclusive representation anyway, at least where the system favors labor unions in general, or an affiliate of the politically powerful National Education Association in particular. And (iii) although an honest affirmance of the District Court's opinion demands explicit rejection

of *Schechter, Carter,* and the political-equality decisions, this Court seeks to avoid responsibility for foisting corporative-state institutions on the American people by hiding the significance of what it has done behind the opaque screen of a summary disposition. Or, even worse, (iv) this Court desires, not only to preserve exclusive representation for labor unions, but also to retain *Schechter* and *Carter* as authorities capable of invalidating corporative-state arrangements that might at some future date favor private special-interest groups other than unions, in order to secure for unions alone an economic and political status superior to that of anyone else.

Obviously, the integrity of the very process of judicial review, not to emphasize this Court's own reputation as a disinterested arbiter of constitutional issues, cannot long survive a public perception that the Court is but a partizan of one or another special-interest group. However, the summary affirmance in No. 82-901 can have no effect other than promoting, if not confirming, such a perception. But, happily, this Court has never treated its summary decisions as of great value as precedent, or refrained from giving full consideration to a question simply because it had been the subject of previous summary action.[107] Therefore, the improvident decision in No. 82-901 interposes no bar to consideration in these appeals of the unconstitutionality of exclusive representation.

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[107] Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180-81 (1979); Edelman v. Jordan, 415 U.S. 651, 670-71 (1974); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring); Richardson v. Ramirez, 418 U.S. 24, 82 n.27 (1974) (Marshall, J., dissenting).

CONCLUSION

This Court should vacate its summary affirmance in No. 82-901 and: (i) affirm the decision of the District Court that PELRA is unconstitutional insofar as it licenses MCCFA, as exclusive representative in the community colleges, to monopolize the "meet-and-confer" process by virtue of its unconstitutional status as such representative; and (ii) reverse the decision of the District Court sustaining the validity of exclusive representation under PELRA's "meet-and-negotiate" provisions; or, in the alternative, (iii) order the parties to submit further briefs, and itself schedule oral argument, on the issues Knight and the other faculty-members originally raised in No. 82-901.

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APPENDIX

Excerpt from R. Marshall, *et alia*, *An Economic Strategy for the 1980s: The Failure of Reagonomics and the Full Employment Alternative* (1982)

APPENDIX

Rebuilding American Industry

The essence of sound economic policy in the future will be to integrate the wide variety of public and private sector decisions that bear on the nation's capacity to achieve full employment, economic growth and stable prices. A means must be created to establish and discuss realistic long-term goals, review private sector responses to public sector stabilization policies, resolve conflicting objectives, and construct the proper mix of general and selective policies. To be effective, such discussions must involve all the major concerned parties—industry, labor and government.

Such consultative forums have worked well in this country. The Steel Tripartite Committee, formed in 1977, brought together the leadership of the steel industry, labor, and the heads of government agencies to examine the industry's problems of international trade, occupational safety and health, environmental protection, investment taxes, plant closings and worker/community adjustment programs, and new technology for steel production. In the summer of 1980, the Steel Tripartite Committee made a wide-ranging set of recommendations to the President, many of which were accepted, [45] leading to the widely acclaimed "steel stretch-out" for meeting environmental deadlines and other policy changes. The Construction Industry Coordination Committees have brought together labor, construction management, and concerned government officials to develop ways to reduce the extreme seasonal fluctuations in construction activity—fluctuations that add to inflationary pressures by creating manpower and resource shortages in the construction industry. Other recent examples include the airline and coal industries. For more general economic policy consultation among business, labor, and government we have the examples of the Reconstruction Finance Corporation (RFC) and the War Production Board from the 1930s and 1940s.

Bringing together the experience and expertise of labor, management, government and others with a stake in the future of our economy would undoubtedly improve our ability to target scare resources and revitalize our economy. In many areas we suffer not from a shortage of resources, such as investment capital, but rather from an inefficient allocation of those resources among industries and among uses. The challenge today calls for a forum for building a policy consensus to address such necessary questions as inflation and the reconstruction of our aging and weakened industrial base, including transportation, communication and energy-providing facilities.

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[46] Since existing formal or informal institutions are not sufficient, a National Economic Policy Board (NEPB) should be created. The members of the board would include labor, business, government and independent experts. The Federal Reserve Board also should play an active role.

First, the board would provide a means through which discussions could be held regularly on economic performance and forecasts, stabilization policies and the reaction of private sector institutions. In addition, it would be a major mechanism for providing continuity in economic policy, particularly as Administrations change.

Second, the board would provide the right framework for working out the incomes policy needed in the fight against inflation. The major elements of the economy would be represented, and in the board they would also have responsibility for the overall economic policies into which successful wage and price policies must fit.

Third, the board would be the vehicle for framing a coherent industrial policy. The U.S. already has an industrial policy, but it is not the result of clear and systematic thinking. Trade policy, taxes, regulations, energy, and even interest rates have a significant impact on the structure of

the economy and the opportunities, or lack of them, for industries and firms. In order to resolve structural problems, anticipate future needs, and intgrate sector policies with stabilization policies, it is time to coordinate those decisions and at the least understand their consequences. • • •

To build an appropriate American industrial policy, the NEPB would create under its auspices a series of industry committees composed of the labor, business and government leadership involved in each particular sector. Although each industry committee would establish its own agenda and work to examine and solve industry-specific problems, the board would [47] have the responsibility to balance competing interests across industries and identify larger issues that could be addressed through general policies.

In addition to industry committees, regional committees should be established on a representative basis to study and make recommendations on the needs of particular geographic regions of the country, including the special needs of our older urban areas. Within the framework of general economic policies, specific industries and regions have specific problems best served by targeted solutions. The work of the board and its industry committees should be augmented by an industrial development bank to channel investment into long-term economic development. Such a bank would be closely tied to the board in its operations and could be financed largely by private resources with special consideration given to using pooled pension fund money.